

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHARLES M. KUPPERMAN,

Plaintiff,

v.

UNITED STATES HOUSE OF
REPRESENTATIVES, *et al.*,

Defendants.

No. 19-cv-3224 (RJL)

**HOUSE DEFENDANTS' NOTICE OF MOOTNESS AND
MOTION TO VACATE BRIEFING SCHEDULE**

The subpoena at issue in this matter has been withdrawn and there is no current intention to reissue it. Therefore, this matter is moot and should be dismissed. At minimum, because Plaintiff Charles M. Kupperman faces no pending, imminent, or foreseeable injury, Defendants the United States House of Representatives, Nancy Pelosi, Adam B. Schiff, Eliot L. Engel, and Carolyn B. Maloney (the House Defendants) respectfully request that the Court vacate the current expedited briefing schedule. Counsel for the House Defendants have conferred with counsel for Plaintiff and for Defendant Donald J. Trump, and understand that Plaintiff will state his position in response to this motion, and that Defendant Trump takes no position at this time, but reserves the right to respond.

1. On October 25, 2019, the House Permanent Select Committee on Intelligence (HPSCI) issued a subpoena to Plaintiff compelling him to appear for a deposition on October 28, 2019, in connection with the House's impeachment inquiry. Compl. ¶ 14 (Oct. 25, 2019), ECF No. 1; *see* Compl., Ex. A. On the same day the subpoena was issued, the White House instructed Plaintiff "not to appear and testify in response to the subpoena," asserting a purported

“constitutional immunity of current and former senior advisors to the President.” *Id.* ¶ 18; *see id.*, Ex. B. Also on October 25, Plaintiff filed this suit, requesting that this Court declare (1) whether HPSCI’s subpoena “is authorized by, and valid under, House Rules,” and (2) whether “the President’s assertion of immunity from Congressional process on behalf of Plaintiff is valid and binding on Plaintiff.” *Id.*, Prayer for Relief ¶ A(1), (2).

Plaintiff declined to appear at his deposition scheduled for October 28, 2019. Subsequently, Plaintiff notified the parties and this Court that, due to the adoption of House Resolution 660 (2019), “declaratory relief is no longer necessary” as to the first question above: whether HPSCI’s subpoena “is authorized by, and valid under, House Rules.” Notice at 1 (Nov. 4, 2019), ECF No. 20.

Under the current schedule, Defendants “shall file any dispositive motions they intend to bring in this case” by November 14, 2019. Order (Nov. 4, 2019), ECF No. 19. Under the standard schedule that would otherwise govern, Defendants’ response to the complaint would be due by December 27, 2019. *See* Pl.’s Affidavit of Service (Nov. 1, 2019), ECF No. 16; Fed. R. Civ. P. 12(a)(2).

2. On November 5, 2019, HPSCI withdrew the subpoena to Plaintiff that is the subject of this suit. *See* Ex. A. In light of the status of the House’s impeachment inquiry, House Defendants have no current intention to reissue the subpoena to Plaintiff. Accordingly, Plaintiff has no current or reasonably foreseeable “duty to comply with a lawful constitutional subpoena issued to him by a duly authorized committee of the House of Representatives.” Compl. ¶ 42.

Even setting aside other jurisdictional barriers to proceeding here, *see* 10/31 Hr’g Tr. at 14-15, ECF No. 15, this case should be dismissed as moot. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (“If an intervening circumstance deprives the plaintiff of a personal

stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.” (quotation marks omitted)); *Cierco v. Mnuchin*, 857 F.3d 407, 415 (D.C. Cir. 2017) (voluntary cessation exception to mootness “does not apply” where challenged governmental action “ha[s] been completely withdrawn” and there is no “likelihood that [the government] will reissue the withdrawn” action, such that the plaintiff “cannot now show that [he is] likely to suffer the same injury in the future”).

If the Court declines to dismiss this matter outright, House Defendants respectfully request that the Court vacate the expedited briefing schedule currently in place. The withdrawal of the subpoena at issue here has eliminated any present, impending, or foreseeable injury to Plaintiff. At minimum, there is no good cause for expedition. If the Court does not dismiss this action or vacate the expedited briefing schedule currently in place, returning this case to the standard schedule,¹ counsel for House Defendants respectfully request a status conference to discuss an alternative briefing schedule at the Court’s earliest convenience.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter (DC Bar No. 253492)

General Counsel

Todd B. Tatelman (VA Bar No. 66008)

Deputy General Counsel

Megan Barbero (MA Bar No. 668854)

Associate General Counsel

Josephine Morse (DC Bar No. 1531317)

Associate General Counsel

Adam A. Grogg (DC Bar No. 1552438)

Assistant General Counsel

¹ In the event that the Court does not dismiss this action, the House Defendants anticipate filing a motion to dismiss under Federal Rule of Civil Procedure 12 at the appropriate time.

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Counsel for House Defendants

November 6, 2019

Exhibit A

Congress of the United States
Washington, DC 20515

November 5, 2019

Michael W. Kirk, Esq. & Charles J. Cooper, Esq.
Cooper & Kirk PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Messrs. Kirk and Cooper:

The House Permanent Select Committee on Intelligence, in consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform, hereby withdraws its subpoena, which the Intelligence Committee served on your client, Dr. Charles M. Kupperman, on October 25, 2019.

As your November 4, 2019, notice to the court acknowledges, due to passage by the House of Representatives on October 31, 2019, of H. Res. 660, your client's request for declaratory relief "is no longer necessary on the question whether the subpoena issued by the House Defendants to Plaintiff is authorized by, and valid under, House Rules." You informed the court that you would file an amended complaint "that will eliminate that request."¹

Having conceded that the Intelligence Committee's subpoena is valid and authorized, your complaint raises a single remaining request before the court: that, notwithstanding substantial jurisdictional deficiencies, the court should decide whether Dr. Kupperman, a former government official, may defy a duly authorized subpoena at the direction of the White House on a theory advanced by the Department of Justice's Office of Legal Counsel that he is "absolutely immune" from compelled congressional testimony.

The question whether the Executive Branch's "absolute immunity" theory has any basis in law is currently before the court in *Committee on the Judiciary v. McGahn*, No. 19-cv-2379 (D.D.C. filed Aug. 7, 2019). In addition to not suffering from the jurisdictional flaws in Dr. Kupperman's suit, *McGahn* is procedurally much further along. In *McGahn*, cross-motions for summary judgment presenting the absolute immunity question are fully briefed, and oral argument was held on October 31, 2019. At that hearing, the judge stated that she "underst[ood] . . . the need for expedition" and that she would "do [her] best to turn [an opinion] around as quickly as possible." *McGahn* is, therefore, much closer to resolution by the court than Dr. Kupperman's flawed suit.

Unless your lawsuit was admittedly only for purposes of delay, and without a subpoena in force, the Committees expect that your client will voluntarily dismiss the complaint he filed in the United States District Court for the District of Columbia on the same day he received the Committee's subpoena and be guided by the decision in *McGahn*.

¹ Pl.'s Notice at 1, *Kupperman v. U.S. House of Representatives* (D.D.C. filed Nov. 4, 2019), ECF No. 20.

Michael W. Kirk, Esq. & Charles J. Cooper, Esq.

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Dr. Kupperman still has an opportunity to fulfill his solemn constitutional duty. Like the many dedicated public servants who have appeared before the Committees despite White House efforts to prevent or limit their testimony—including current and former White House officials who worked alongside your client—Dr. Kupperman can still add his testimony to the inquiry's record.

The House's impeachment inquiry will not countenance, however, further efforts by witnesses or the White House to delay or otherwise obstruct the Committees' vital investigatory work. As the Committees have made clear, noncooperation at the direction of President Trump shall constitute evidence of obstruction of the impeachment inquiry and may be used as a basis for drawing an adverse inference against the President.

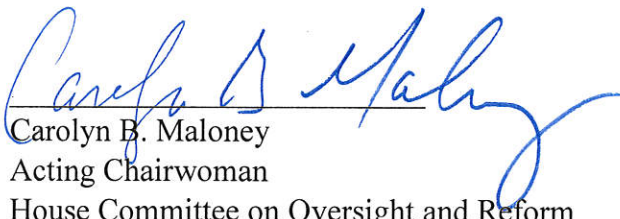
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

cc: The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

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[PROPOSED] ORDER

Upon consideration of the House Defendants' Notice of Mootness and Motion to Vacate Briefing Schedule (Nov. 6, 2019), any responses thereto, and the entire record herein, it is hereby

ORDERED that the House Defendants' motion, which notes that this case has become moot, is **GRANTED**; and it is further

ORDERED that the briefing schedule established by this Court's Order (Nov. 4, 2019), ECF No. 19, is **VACATED**; and it is further

ORDERED that Defendants' responses to Plaintiff's complaint are due by December 27, 2019.

SO ORDERED.

Date

U.S. District Judge